

Public Prosecutor v Kasihku Sdn Bhd

HIGH COURT (ALOR SETAR) — CRIMINAL APPEAL NO 41-85-89
KC VOHRAH J
28 MARCH 1991

Criminal Procedure — Company as offender — Non-payment of provident fund contributions — Company charged — Whether company representative can be imprisoned — Employees Provident Fund Act 1951, s 16 — Criminal Procedure Code (FMS Cap 6), ss 136 & 173

Provident Fund — Non-payment of contributions — Whether representative can be charged when company fails to pay contributions — Whether representative can be punished for company's default — Employees Provident Fund Act 1951, s 16

The defendant was charged with three counts of failure to remit contributions under the Employees Provident Fund Act 1951 ('the Act'). Through its representative, the defendant pleaded guilty and was fined and also ordered to pay the arrears by instalments. The defendant defaulted in payment of the arrears and was brought back to court where the prosecution applied to have the defendant's representative imprisoned. The magistrate refused the application and instead ordered that the arrears be recovered as a civil debt. The prosecution appealed.

Held, allowing the appeal in part:

(1) It was the defendant company that was charged with the offence, although there was provision for charging the director, manager, secretary or other officer in the Act.

(2) A person as officer of the defendant company could not be sent to prison for offences preferred against the defendant company and for the failure of the defendant company to pay up the arrears ordered to be paid if there was no prosecution instituted against him as officer of the defendant company under s 18 of the Act.

(3) The order for recovery of the arrears was made by a court of criminal jurisdiction exercising powers under s 16A(4) of the Act. The uncollected arrears if not paid pursuant to the aforesaid order can only be recovered by the issue of a warrant under s 283 of the Criminal Procedure Code (FMS Cap 6) for the levy of the amount by distress and sale of property belonging to the defendant company. The order to recover the unpaid arrears was therefore wrong and the case was remitted back to the presiding magistrate to exercise his discretion within the ambit of s 283.

[Bahasa Malaysia summary]

Defendan telah didakwa dengan tiga tuduhan kegagalannya untuk meremit caruman di bawah Akta Kumpulan Wang Simpanan Pekerja 1951 ('Akta itu'). Melalui wakilnya, defendan mengaku salah dan didenda dan juga diperintah supaya membayar tunggakan secara ansuran. Defendan ingkar dalam bayaran tunggakan ini dan telah dibawa balik ke mahkamah di mana pihak pendakwa memohon supaya wakil defendan dipenjarakan. Majistret menolak permohonan itu, tetapi mengarahkan bahawa tunggakan itu dituntut kembali sebagai satu hutang sivil. Pihak pendakwa merayu.

Diputuskan, membenarkan sebahagian rayuan:

(1) Adalah syarikat defendan yang didakwa dengan kesalahan, walaupun terdapat peruntukan bagi mendakwa pengarah, pengurus, setiausaha atau pegawai lain Akta itu.

(2) Seseorang sebagai pegawai syarikat defendan tidak boleh dihantar ke penjara bagi tuduhan kesalahan-kesalahan yang dibuat terhadap syarikat defendan dan bagi kegagalan syarikat defendan untuk membayar kembali tunggakan yang diarah supaya dibayar, sekiranya tidak ada pendakwaan terhadapnya sebagai pegawai syarikat defendan di bawah s 18 Akta itu.

(3) Perintah bagi mendapat kembali tunggakan adalah dibuat oleh sebuah mahkamah yang berbidangkuasa jenayah menggunakan kuasa-kuasanya di bawah s 16A(4) Akta itu. Tunggakan yang tidak dikumpul, sekiranya tidak dibayar menurut perintah yang tersebut di atas, hanya boleh didapati kembali melalui pengeluaran satu waran di bawah s 283 Kanun Acara Jenayah (FMS Bab 6) untuk levi jumlah itu secara distres dan jualan harta yang dipunyai oleh syarikat defendan. Perintah untuk mendapat kembali tunggakan yang tidak dibayar, dengan itu, adalah salah dan kes ini dihantar balik kepada mejistret yang bersidang untuk menggunakan budi-bicaranya dalam ambit s 283.]

Cases referred to

- 1 *Coastal Bus Co Ltd v PP* [1962] MLJ 324 (refd)
- 2 *Dunlop Malaysian Industries Bhd v PP* [1985] 1 MLJ 313 (refd)
- 3 *Pillay v PP* [1965] 1 MLJ 35 (folld)
- 4 *Mek v Che Mas* [1948] MLJ 36 (folld)
- 5 *Justin Milroy Narakera v PP* [1990] 2 CLJ 226 (folld)
- 6 *PP v Pontian Bus Bhd* [1988] 2 MLJ 530 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 136, 173, 283
Employees Provident Fund Act 1951 ss 16, 17, 18
Subordinate Courts Act 1948 s 99

Mohd Zabidin bin Mohd Diah (Deputy Public Prosecutor) for the appellant.

KH Choe for the defendant.

Cur Adv Vult

KC Vohrah J: In the magistrates' court the defendant, a limited company, was charged on three counts for failure to remit to the Employees Provident Fund (EPF) contributions as required by the Employees Provident Fund Act 1951 (Rev 1982) ('the Act') in respect of an employee's wages for the months of December 1986 (the first charge), January 1987 (the second charge) and February 1987 (the third charge), all of which were offences under s 16A(1)(c) of the Act.

On 8 February 1988 the defendant company through a representative pleaded guilty to all three charges and a fine of \$120 in default of payment of which a term of 12 days' imprisonment was imposed on each charge. The fines were paid. In addition, in the same proceedings, the defendant company was ordered to pay arrears of prescribed contributions in respect of the wages of named employees amounting to \$17,543. The court allowed this amount to be paid within seven months starting with a first instalment of \$2,543 payable on 1 March 1988 and the balance on six consecutive instalments at \$2,500 per instalment. At the end of seven months not all the arrears were paid and eventually the defendant

company was brought to court again and another three months were given for the debt to be settled. No payments were made and the matter came up for mention before another magistrate. The magistrate refused to send the manager of the defendant company, who appeared at this hearing, to prison for the default of the defendant company in paying up the arrears and ordered that the balance of the arrears remaining unpaid be sued for as a civil debt. The public prosecutor has appealed against the order that the balance of the arrears remaining unpaid be recovered as a civil debt.

The provision allowing a court with criminal jurisdiction to order payment of arrears of prescribed contributions is a peculiar provision under s 16A(4) of the Act which reads:

Upon being found guilty of any offence under section 16A(1)(c), the Court before which the employer is found guilty shall order such employer to pay to the Board the amount of any contributions, together with any interest credited thereon, due and payable to the Board and certified by the Accountant of the Board to be due from such employer, prior to the date of such founding of guilty (sic) and such contributions shall be recoverable in the same manner as a fine; and any order made under this subsection shall be appealable as if it were an order for payment of compensation under section 426 of the Criminal Procedure Code.

To come back to the earlier order allowing for the arrears to be paid by instalments — the first instalment was paid but the defendant company defaulted in paying all the other instalments amounting to \$15,000. When the defendant company was brought to court on 29 October 1988, it is not clear which officer from the defendant company appeared on its behalf. There was a request from this person for time for the defendant company to pay the balance of the arrears as he said that the company was running at a loss. The magistrate acceded to the request and made this order.

Defendant is given opportunity to settle the whole arrears due within three months' time in default will be liable to imprisonment to be ordered by the court. (sic)

And the case was adjourned to 27 February 1989 to be brought up for mention. On that date the manager of the defendant company, Encik Siew Choon Koon, appeared as officer of the company. The prosecuting officer informed the new magistrate that the balance of the arrears had not been paid and requested for a term of imprisonment to be imposed on the manager for the default in the payment of the balance by the defendant company, no doubt harking back to the order of the previous magistrate who noted that in default of settling the arrears within three months the 'defendant ... will be liable to imprisonment to be ordered by the court'. The prosecuting officer also relied on para 20 of the Third Schedule to the Subordinate Courts Act 1948 (read with s 99A of that Act). Counsel for the defendant

A company stated the obvious that the defendant company, being a limited company, cannot be sent to jail (see *Coastal Bus Co Ltd v PP*¹). And he argued that the representative of the defendant company who had appeared that day could not also be sent to jail, relying on *Dunlop Malaysian Industries Bhd v PP*² which dealt with the issue of para 20 of the Third Schedule to the Subordinate Courts Act 1948. He suggested that the EPF Board take civil action against the defendant company to recover the balance of the arrears. The magistrate agreed and ordered that (translated from Bahasa Malaysia) 'the arrears of \$15,000 be claimed as a civil debt under s 17 EPF (sic) and the defendant cannot be sentenced to imprisonment ...'.

In her grounds of decision she stated that she could not order the representative of the company to be sent to prison for the default of the company in paying the arrears. And she is clearly right in her decision in that respect. It will be noted that it was the defendant company that was charged for the offences in court. Although there is provision under s 18(2) of the Act for charging the director, manager, secretary or other similar officer of the defendant company for the offences and this was done in *Pillay v PP*³ where the manager of a motor company was charged for an offence under the EPF Ordinance (as it was known then) and the same s 18(2) was invoked to prefer the charge against Pillay (the manager of the company); this, however, was not done in the present case. Perhaps in not preferring a charge against an officer of the present defendant company, the officer who directed the prosecution of the defendant company had in mind the words of the Ong J (as he then was) in *Pillay's case*:³

Justice is achieved in these cases of statutory strict liability by charging the company. To single out, instead, an officer of the company for punishment, unless he was in some way personally liable is an affront to moral conscience.

G The point in this case is that no prosecution was ever instituted against an officer of the defendant company unlike, as was pointed out, the situation in *Pillay's case*³ where a complaint was lodged against Pillay 'as manager' of a company. A complaint was lodged merely against the defendant company in this case. Naturally there was no issue of process against any officer under s 136 of the Criminal Procedure Code (FMS Cap 6) ('CPC') (read with s 3); and no person as officer of the defendant company was summoned to court in the capacity of such officer. Naturally, too, no person as officer of the defendant company was charged for the offences, let alone charged for the offences read with s 18(2) of the Act. And under s 173(a) of the CPC, before a summary trial can begin in respect of a person accused of an offence, a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him and he shall be asked

whether he is guilty of the offence charged or claims to be tried. And of course this could not be and was not done. As was pointed out by Taylor J in *Mek v Che Mas*⁴ at p 37:

It is vital to justice that every person accused of an offence, however trivial, should be definitely charged and should have the opportunity to defend himself. I will deal first with the case of the complainant. No prosecution was ever instituted against her; no information was laid; she was not summoned; she was not charged. She was never called upon to plead ... She had no opportunity of defence or extenuation ...

It is therefore quite clear that a person as officer of the defendant company cannot be sent to prison for offences preferred against the defendant company and for the failure of the defendant company to pay up the arrears ordered to be paid if there was no prosecution instituted against him as officer of the defendant company under s 18(2) of the Act. In this respect it is apposite to bear in mind the words of Shankar J in the recent case of *Justin Milroy Narakera v PP*:⁵

The prosecuting EPF officer however successfully persuaded the learned magistrate that the inability to get at the company was no bar to getting immediately at Mr Narakera because he was the managing director of the company who had negotiated the instalments terms in question.

This was done by resort to s 18(2) of the EPF Act ...

It is the considered opinion of the court that before resort can be had to this section the director of the corporation in question has to be formally charged and the ingredients of the section proved against him. The two ingredients required to make out a prima facie case are that the company has committed the offence and secondly that the director was a director at the time the offence was committed.

By transposing Mr Narakera into the shoes of the company, as if he were its alter ego, without any evidence whatsoever before him of the second ingredient the magistrate did something which was totally impermissible in law. Had he been formally charged it would have been open to Mr Narakera even if he had been a director at the time, to give evidence of due diligence. The learned magistrate pre-empted this right. Furthermore the liability to pay the arrears of contributions recoverable as a 'fine' was the liability of the company. It does not automatically pass on to its directors under s 18(2) of the Act. What fine a director must pay must be assessed after he is convicted for the offence of which he is to be deemed guilty. That liability is to the fine per se. The liability to pay arrears of contributions which shall be recoverable as a fine is a liability of the employer alone under s 16A(4).

As I have said earlier the magistrate was clearly right in not acceding to the request of the prosecution officer to send the manager of the defendant company who appeared before her to prison for the default of the company. But she ordered that the balance of the arrears be recovered as a civil debt under s 17 of the Act. The public prosecutor is dissatisfied with this order.

The point made by Encik Zabidin, the deputy public prosecutor in this appeal, as I understand him, is that

A when the said magistrate made the order that the debt be recovered as a civil debt she was in effect revoking the previous orders given by magistrates of co-ordinate jurisdiction allowing for instalment payments of the debt within a certain period and a subsequent extended period; that there being a default after the extended period was given, she should have issued a warrant for the levy of the amount by distress and sale of any property belonging to the defendant company under s 283(i)(b)(3) of the CPC.

C In a sense the learned DPP is correct in coming to that view but I think in reality the magistrate was under a misconception that she could not proceed under s 283 of the CPC. I have re-read the grounds of decision of this magistrate as to why she made the order as she did. And it seems to me she has misread the decision of the Supreme Court in *PP v Pontian Bus Bhd.*⁶ Wan Sulaiman SCJ in that case in fact said, at p 531, that (the notion) that the EPF Act 'limits recovery of arrears of contribution only to those means available as in a civil debt ... is controverted by the words of s 17(1) of the Act which states that all contributions payable under the Act may, *without prejudice to any other remedy*, be recoverable by the Board summarily as a civil debt.'

E The point to remember in the case under appeal is that the order for the recovery of the arrears was made by a court of criminal jurisdiction exercising powers under s 16A(4) of the Act after the defendant company had pleaded guilty. And the court was under a statutory duty under s 16A(4) to order recovery of the arrears in the same manner as a fine. In exercising discretionary powers under s 283(i)(b)(2) of the CPC the first magistrate of the court allowed the defendant company to pay by instalments. When the first period of time within which the instalments had to be paid expired (with a large amount of the arrears remaining unpaid), the second magistrate of the court allowed extension of the period for the instalment payments. The extended period has expired and a substantial amount of the arrears remain unpaid. There remains the undischarged duty of the court to see that the order of the court for the recovery of the arrears made under s 16A(4) in the first instance is carried out under the provisions of s 283 of the CPC and any unpaid amount recovered. And this can only be done by the incumbent magistrate of the court issuing a warrant under s 283(i)(b)(3) for the levy of the amount by distress and sale of the property belonging to the defendant company if the magistrate is not minded, after due enquiry, to giving another extension of time to the defendant company for the payment of the unsettled amount.

I It is for this reason that I must set aside the order of the magistrate that the arrears be recovered as a civil debt. The order she made amounts to a refusal to take action under s 283 of the CPC to recover the balance of

the arrears remaining unpaid when in fact there is no discretion to refuse to take such action once a defendant has been ordered, under a 16A(4) of the Act, to pay the arrears by the court.

The magistrate who dealt with the matter under appeal has gone on transfer and I therefore remit the matter to whoever is the presiding magistrate of the court to exercise his discretion, within the ambit of the provisions of s 283 of the CPC, whether to grant another period of extension within which the defendant company may pay the unsettled amount by instalments or to issue a warrant for the levy of the amount by distress and sale after due enquiry of all relevant circumstances.

Appeal allowed in part.

Solicitors: *Syarikat Choe.*

Reported by *Mathavan Devadas*

Hongkong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah

HIGH COURT (KUANTAN) — SUIT NO 23-65-86
LAMIN J
8 JANUARY 1991

Land Law — Remedies — Land charged to plaintiff — Default in payment — Foreclosure proceedings pending in land office — Civil suit against defendant — Personal liability — Whether plaintiff entitled to proceed with civil suit before first realizing security — Whether plaintiff entitled to proceed concurrently on all remedies — National Land Code 1965, s 260

Land Law — Foreclosure — Foreclosure proceedings pending in land office — Civil suit instituted — Whether civil suit should proceed before security is realized under the charge

This was an application by the plaintiff bank for the decision of this court on the following questions: 'whether the plaintiff being also the chargee of property comprised under HS(M) 13399 lot 3134/29 in the mukim of Kuala Kuantan ('the said land') was entitled at law and in equity to proceed by way of a civil suit before first realizing the security under the charge and if so, whether the plaintiff was entitled to proceed concurrently on all its remedies.'

The plaintiff bank had granted a housing loan to the defendant on the security of the said land which was charged to the plaintiff bank. The outstanding amount due as at 9 May 1986 to the plaintiff on the said facility for which a claim was being made was \$290,873.56. To realize the money owing, the plaintiff applied for an order for sale of the said land and the Kuantan Land Office had granted the application but had yet to fix the date of auction. The plaintiff also filed a writ of summons in this court claiming the amount due.

The plaintiff's counsel maintained that the question as posed to this court must be answered in the affirmative in that both the foreclosure proceedings and the civil suit could concurrently be pursued.

A Held, answering the question in the negative:

(1) The court found that if the amount realized by the chargee on the sale of the charged land was less than the amount due to the chargee, the chargor shall pay to the chargee the difference between the amount due and the amount so realized. So the personal liability of the chargor was only to the extent of the balance of the amount due (cl 8). Upon reading the charge annexure as a whole, both the chargee and chargor were bound by the terms and conditions of the charge and to realize the amount owing, the land must be sold in accordance with the provisions of the National Land Code 1965. If the amount realized from the sale was not sufficient to cover the amount due then it was implied that a separate action may be taken against the debtor/chargor to recover the balance should he fail to pay the difference.

C (2) There was no written guarantee involved in the present case. The only form of agreement or covenant agreed by both parties was the annexure to the charge which carried the terms and conditions of the charge. The real intent of cl 8 of the annexure appeared to be that when the loan became payable, the plaintiff would immediately become entitled to recover and when he decided to proceed for recovery, he must exercise his rights and powers as provided in the annexure to the charge. In the present case, the land administrator is a competent tribunal under the law where the plaintiff could obtain a complete remedy, and to allow the plaintiff to file an action before another tribunal, in this case the High Court, where the earlier proceedings had not even been completed before the land administrator, must be treated as a case of abuse of the process of the court. The foreclosure action was complete upon the sale of the land and should there be a shortfall after recovery of the amount due from the sale price, cl 8 was immediately attracted in that the chargor shall make good the difference. Whether the chargor in that event would or would not comply was not in issue for the determination of what was a 'complete remedy'.

E (3) In the circumstances, the answer to the question posed before the court was in the negative and accordingly the court ordered that the present suit be stayed and that costs be in the cause.

[Bahasa Malaysia summary]

G Ini adalah suatu permohonan oleh bank plaintiff bagi keputusan mahkamah ini atas soalan-soalan berikut: 'sama ada plaintiff yang juga pemegang gadaian tanah yang dipegang di bawah HS(M) 13399 lot 3134/29 dalam mukim Kuala Kuantan ('tanah tersebut') adalah berhak di sisi undang-undang dan dalam ekuiti untuk bertindak melalui satu guaman sivil sebelum terlebih dahulu menghasilkan cagaran di bawah gadaian, dan jika sedemikian, sama ada plaintiff berhak bertindak pada masa yang sama atas segala remediannya.

H Bank plaintiff telah memberi satu pinjaman perumahan kepada defendan atas jaminan tanah tersebut yang telah digadai kepada bank plaintiff. Jumlah yang terhutang setakat 9 Mei 1986 kepada plaintiff atas kemudahan tersebut di mana satu tuntutan telah dibuat adalah \$290,873.56. Untuk menghasilkan wang yang terhutang, plaintiff memohon bagi suatu perintah jualan tanah tersebut dan pejabat tanah Kuantan telah membenarkan permohonan tetapi belum lagi menetapkan tarikh lelong. Plaintiff juga memfail satu writ saman dalam mahkamah ini menuntut jumlah yang terhutang.

I Peguam plaintiff menegaskan bahawa soalan yang ditujukan kepada mahkamah ini mesti diberi jawapan yang mengiakan bahawa kedua-dua prosiding sekat-tebusan dan guaman sivil boleh dijalankan bersama-sama.